Whistleblower Newsletter Nuclear and Environmental

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	U.S. Department of Labor **Office of Administrative Law Judges** **800 K Street, NW, Suite 400-N** **Washington, DC 20001-8002** **(202) 693-7500** **www.oalj.dol.gov**	**John M. Vittone** **Chief Judge**

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II. Filing requirements, generally

[Nuclear and Environmental Whistleblower Digest II B 1 b]
AMENDMENT OF COMPLAINT BASED ON IMPLIED CONSENT OF THE PARTIES

In ***Lewis v. U.S. Environmental Protection Agency***, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007), the Complainant alleged that the Respondent's failure to credit his research in a *Federal Register* notice responding to a Congressionally commissioned report of the National Academy of Sciences on the scientific basis for EPA Rule 503, and EPA's failure to fund two scientific projects he had proposed, were adverse employment action because such actions harmed his professional reputation. None of these actions were raised in the complaint or listed as an issue in the Complainant's prehearing statement. The ALJ, however, made findings and conclusions about these claims (finding against the Complainant), and the EPA did not raise an objection to the Complainant's raising of the issues. The ARB, therefore, found that the parties had consented to amendment of the complaint to include the claims. *See* 29 C.F.R. § 18.5(d); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ NO. 2002-STA-35, slip op. at 8-9 (ARB Aug. 6, 2004).

III. Time limits on filing

[Nuclear and Environmental Whistleblower Digest III C 1]
TIMELINESS OF COMPLAINT; CONTINUING VIOLATION DOCTRINE NO LONGER VIABLE

In ***Lewis v. U.S. Environmental Protection Agency***, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007), the ALJ erred in applying the "continuing violation" doctrine to find that the Complainant had made a timely complaint alleging that the EPA had engaged in adverse employment action when it failed to follow its internal peer review process for granting permission to its scientists to publish research papers. Rather, the ARB found applicable the "discrete action" standard from *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114-15 (2002). Thus, because the Complainant knew more than two months prior to filing of his environmental whistleblower complaint that a scientist well-known to advocate a position different from that of the Complainant in regard to the subject of the paper (whether sludge fertilization presents public health risks) had inappropriately participated in the peer review, and the applicable limitations period was only 30 days, the complaint was untimely.

VIII. Powers, responsibilities and jurisdiction of ALJ, Secretary and federal courts

[Nuclear and Environmental Digest VIII B 1 b]
TIME PERIOD FOR FILING APPEAL TO THE ARB; ARGUMENT THAT REGULATORY 10 DAY TIME PERIOD IS TOO SHORT IS AN INADEQUATE JUSTIFICATION FOR AN UNTIMELY APPEAL

In ***Williamson v. Washington Savannah River Co.***, ARB No. 07-071, ALJ No. 2006-ERA-30 (ARB June 28, 2007), the Complainant failed to file a petition for review of the ALJ's decision within 10 business days of issuance of the ALJ's decision, as required by the regulation at 29 C.F.R. § 24.8(a). The ARB observed that this regulation "is an internal procedural rule adopted to expedite the administrative resolution of cases arising under the environmental whistleblower statutes. Therefore, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review." USDOL/OALJ Reporter at 3 (footnotes omitted). The Complainant's argued that 10 days was too little time for a pro se complainant to make an appeal. The ARB agreed that 10 days was a short time, but noted that pro se complainants had routinely been able to file appeals in that time frame. The ARB found the justification inadequate and dismissed the appeal.

[Nuclear and Environmental Digest VIII B 2]
SCOPE OF APPELLATE REVIEW; FAILURE OF RESPONDENT TO CROSS-PETITION ON ISSUE OF SOVEREIGN IMMUNITY

In ***Overall v. Tennessee Valley Authority***, ARB No. 04-073, ALJ No. 1999-ERA-25 (ARB July 16, 2007), the ARB rejected an argument from the Complainant that the Respondent could not raise a sovereign immunity issue on appeal because it had not filed a cross-petition for a review of the ALJ's holding on this issue. Rather, the ARB stated that it is obligated to inquiry sua sponte whenever a doubt about subject matter jurisdiction arises.

[Nuclear and Environmental Digest VIII B 2]
SCOPE OF APPELLATE REVIEW; TRIAL OF ISSUES BY CONSENT

In ***Overall v. Tennessee Valley Authority***, ARB No. 04-073, ALJ No. 1999-ERA-25 (ARB July 16, 2007), the Respondent argued that the Complainant's discrete adverse action claims could not be asserted on appeal because they were not contained in his complaint, which alleged only that the Respondent subjected him to a hostile work environment. The ARB, however, found that the discrete adverse action claims had been tried before the ALJ by consent of the parties, citing 29 C.F.R. § 18.5(e).

IX. Miscellaneous procedural issues

[Nuclear and Environmental Digest IX A]
STAY OF REMEDIES; FOUR-PART TEST

In ***Tipton v. Indiana Michigan Power Co.***, ARB No. 04-147, ALJ No. 2002-ERA-30 (ARB June 27, 2007), the ARB denied the Respondent's motion for a stay of administrative remedies. The Board uses a four-part test to determine whether to stay its own actions: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants a stay; and (4) the public interest in granting a stay. In the instant case, the ARB found that the Respondent was not likely to prevail on the merits on appeal despite the Respondent's contention that the ARB applied the wrong legal standard for protected activity. The Respondent argued that payment of the Complainant's attorney fees would result in irreparable harm based on the potentially unnecessary and unrecoverable expense of litigating attorney fees issues before the ALJ and the Board. The ARB rejected this argument, finding that mere injury in terms of money, time and energy is not sufficient to establish irreparable harm. The ARB also rejected the Respondent's argument that the Complainant would not be harmed by a stay on compensatory damages. Finally, the ARB found that a stay would be contrary to the public interest.

XII. Protected activity

[Nuclear and Environmental Whistleblower Digest XII C 4]
PROTECTED ACTIVITY; CAA PROTECTED ACTIVITY MUST RELATE TO REASONABLE BELIEF THAT RESPONDENT WAS EMITTING, OR MIGHT EMIT, POLLUTANT INTO THE AMBIENT AIR

In ***McKoy v. North Fork Services Joint Venture***, ARB No. 04-176, ALJ No. 2004-CAA-2 (ARB Apr. 30, 2007), the Complainant contended that he engaged in protected activity when he informed a Senate regional staff member and a Homeland Security Site Director that he had observed a supervisor and another employee improperly handling asbestos in the basement of the Plum Island Animal Disease Center bio-containment area and that he believed the asbestos could escape into the air. The ARB stated that "[t]o establish that this was CAA-protected activity, [the Complainant] must prove that when he expressed his concerns about the asbestos to [the Senate staffer and the DHS officer], he reasonably believed that [his Employer] was emitting, or might emit, asbestos into the ambient air. 'Ambient air' is 'that portion of the atmosphere, external to buildings, to which the general public has access.'" USDOL/OALJ Reporter at 6 (footnotes omitted). The Board continued:

> Employee complaints about purely occupational hazards are not protected under the CAA's employee protection provisions. For example, in the case of asbestos, even though the Environmental Protection Agency has regulated the manner in which it is handled within workplaces to prevent emissions into the outside air, if the complainant is concerned only with airborne asbestos as an occupational hazard within the workplace, and not in the outer, ambient air, the employee protection provisions of the CAA would not be triggered.

Id. at 7 (footnotes omitted). The ARB agreed with the ALJ's finding that the Complainant had first raised the issue of a possible failure in the air handling system at the ALJ hearing, and therefore when the Complainant spoke to the officials he did not have a reasonable belief that asbestos could escape into the ambient air. Thus, the Complainant did not engage in protected activity under the CAA.

[Nuclear and Environmental Whistleblower Digest XII C 4]
PROTECTED ACTIVITY; MERE SPECULATION ABOUT POSSIBLE SECURITY BREACHES DOES NOT SUPPORT A FINDING OF REASONABLE BELIEF OF A CAA OR FWPCA VIOLATION

In ***McKoy v. North Fork Services Joint Venture***, ARB No. 04-176, ALJ No. 2004-CAA-2 (ARB Apr. 30, 2007), the Complainant contended that he engaged in protected activity when he informed a Senate regional staff member and a Homeland Security Site Director about alleged security lapses in the bio-containment area of the Plum Island Animal Disease Center. The ARB agreed with the ALJ that the Complainant's concerns about security were speculative and did not constitute a reasonable belief that security breaches could enable persons to gain access to hazardous material and therefore harm the environment. Although the Complainant testified that he "could have" stolen materials and in "some way" escaped undetected, he presented no supporting evidence, whereas the record indicated that the Center had elaborate measures in place to prevent the removal of pathogens. The ARB found that the Complainant did not establish protected activity under either the CAA or the FWPCA.

[Nuclear and Environmental Digest XII C 4]
PROTECTED ACTIVITY; POSSIBLE SPILT IN ARB AND FOURTH CIRCUIT INTERPRETATION OF WHETHER COMPLAINANT'S REASONABLE BELIEF OF VIOLATION ALONE IS SUFFICIENT TO ESTABLISH PROTECTED ACTIVITY

In ***Knox v. United States Dept. of the Interior***, ARB No. 06-089, ALJ No. 2001-CAA-3 (ARB Apr. 28, 2006), **PDF** the matter was on remand to the ARB from the Fourth Circuit. *Knox v. United States Dep't of the Interior*, 434 F.3d 721 (4th Cir. 2006). The ARB found that that the Fourth Circuit believed that the ARB's protected activity standard under the CAA only required that the Complainant in the case reasonably believed that asbestos was escaping into the outside, ambient air, and that the ARB had misapplied that standard. The Board, however, clarified its

standard as requiring whistleblower to take some action on that belief, and indicated that there may be a conflict between the ARB's standard and the standard enunciated by the Fourth Circuit:

> The ARB's protected activity standard for the CAA is . . .that an employee engages in protected activity under the CAA when he or she expresses a concern, and reasonably believes, that the employer has either violated an Environmental Protection Agency (EPA) regulation implementing the CAA or has emitted or might emit, at a risk to the general public, potentially hazardous materials into the ambient air. If the Fourth Circuit's standard for CAA-protected activity, however, requires only that the whistleblower reasonably believe that an employer is violating EPA regulations or is emitting, or is about to emit, potentially hazardous materials into the ambient air, Knox engaged in CAA-protected activity.

USDOL/OALJ Reporter at 5 (footnote omitted). The ARB indicated, however, that regardless of the standard for protected activity, the Complainant still did not prevail in the instant case because he admitted in testimony that he had not expressed a concern to the Respondent's management about asbestos escaping from a Job Corp. facility. Since the Respondent was not aware of the Complainant's protected activity, it could not have retaliated against him because of protected activity.

On appeal again to the Fourth Circuit, the court held:

> To the extent that Knox's claim is based on his concern about asbestos escaping into the ambient air from the Center, we hold that the ARB's decision is supported by substantial evidence. As Knox's counsel admitted at oral argument, there is no evidence in the record to establish that Knox specifically reported his concern about asbestos escaping into the ambient air from the Center to DOI officials, and he has not pointed to any evidence that otherwise sufficiently establishes that DOI was aware of Knox's ambient air concern. Thus, although Knox may have engaged in protected activity regarding ambient air emissions under the ARB's previously announced standard because he reasonably believed that asbestos was being emitted from the Center, *see Knox*, 434 F.3d at 725, DO[I] could not have retaliated against him because of this belief because of his failure to bring it to the attention of DO[I] officials.

Knox v. United States Department of Labor, No. 06-1726, slip op. at 7 (4th Cir. May 23, 2007) (per curiam)(unpublished) (citation omitted). The court, however, remanded on other grounds.

XIII. Adverse action

[Nuclear and Environmental Digest XIII A]
ADVERSE EMPLOYMENT ACTION; TO BE ACTIONABLE, THE RESPONDENT'S ACTIONS MUST HAVE BEEN "MATERIALLY ADVERSE," *I.E.*, HARMFUL TO THE POINT THAT THEY COULD HAVE DISSUADED A REASONABLE WORKER FROM ENGAGING IN PROTECTED ACTIVITY

In ***Overall v. Tennessee Valley Authority***, ARB No. 04-073, ALJ No. 1999-ERA-25 (ARB July 16, 2007), the ARB wrote: "Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. To succeed, Overall must prove by a preponderance of the evidence that TVA took a 'tangible employment action' that resulted in a significant change his employment status. This means that Overall must prove that TVA's action was 'materially adverse,' that is, TVA's actions must have been harmful to the point that they could well have dissuaded a reasonable worker from engaging in protected activity." USDOL/OALJ Reporter at 10-11 (footnotes omitted).

In ***Overall***, the Complainant had been reinstated as the result of an earlier ERA whistleblower complaint. When reinstated, he was given his former job title, schedule and grade, with duties involving the same system that he previously worked on. The Complainant, however, argued that the Respondent did not give him meaningful work comparable to his prior work, and was prevented from work on any open "Problem Evaluation Reports." The ARB, however, affirmed the ALJ's findings that the Complainant had been reinstated to his former position, and that during the 12 days when he was actually on duty during the reinstatement, he was only assigned work appropriate to his position and level of training. The ARB found that the work assigned may have been mundane, but not materially adverse. The Complainant also contended that he had been excluded from meetings and conversations about the system to which he had been assigned. The ARB, however, found that the record supported a finding that he had not been excluded from conversations and meetings that were relevant to his responsibilities as a new member of the operational systems team. The Complainant was not immediately added to e-mail distribution lists; however, the ARB agreed with the ALJ that that the delay was not unreasonable. Finally, the ARB found that an isolated incident when a manager reported a concern that the Complainant was inappropriately planning to attend a rally at a nuclear power plant while on administrative leave did not establish that the supervisor had been monitoring the Complainant's whereabouts. Moreover, the Respondent took no action based on this information, and the Complainant did not demonstrate that he had suffered a materially adverse action from the manager's actions.

[Nuclear and Environmental Whistleblower Digest XIII B 18]
ADVERSE ACTION; DISSEMINATION OF DOCUMENT CRITICAL OF COMPLAINANT'S THEORIES AND RESEARCH WAS NOT ADVERSE ACTION WHERE THE COMPLAINANT DID NOT DEMONSTRATE THAT THE DISSEMINATION HAD ANY ADVERSE EFFECT ON HIS COMPENSATION OR THE TERMS, CONDITIONS OR PRIVILEGES OF HIS EMPLOYMENT; ALLEGATION OF BLACKLISTING REQUIRES SHOWING OF INTENT TO PREVENT FUTURE EMPLOYMENT

In ***Lewis v. U.S. Environmental Protection Agency***, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007), the Complainant was a highly respected microbiologist at the EPA's Office of Research and Development who had been critical of EPA Rule 503 about the application of bio-solid wastes to land, claiming a lack of research into the harmful effects of pathogens released during sludge fertilization. The Complainant served as an expert witness in a wrongful death case grounded in allegation that the death was related to sludge fertilization. These activities prompted a national sludge fertilization company to produce a White Paper criticizing the Complainant's theories and research. This company e-mailed the White Paper to numerous persons in the industry and to EPA employees, including a scientist in EPA's Office of Waste Water Management who was the agency's contact regarding Rule 503. This scientist provided a copy of the White Paper to an attorney for another fertilizer company who was preparing for a state-level public hearing at which the Complainant was scheduled to speak in his personal capacity. That attorney circulated the paper at the hearing and indicated that it had come from the EPA.

On appeal before the ARB the question was presented whether the EPA scientist's dissemination of the White Paper was adverse employment action. The ARB held that it was not, even assuming for purposes of argument that the scientist had some supervisory authority over the Complainant or that the EPA failed to promptly remedy the situation. First, the ARB held that the Complainant failed to demonstrate that distributing the White Paper had any adverse effect on the compensation, terms, conditions or privileges of his employment with EPA. Although the Complainant was unhappy about the distribution and its denigrating contents, the ARB pointed to testimony that the White Paper was "common knowledge" and found that its distribution was not materially adverse to the point where it could dissuade a reasonable worker from engaging in protected activity. The ARB noted that, in fact, the Complainant had not been dissuaded, had continued to promulgate his views, and was eventually vindicated about the need for more research.

The ARB found that the Complainant's argument that distributing the White Paper was "badmouthing" was an allegation of blacklisting, which to be actionable requires a showing that information was disseminated to prevent a complainant from finding employment, and not merely subjective feelings toward the action. The ARB found that the Complainant's claims that the White Paper damaged his reputation and thus his future employment prospects failed because he provided no evidence that EPA

managers intentionally disseminated damaging information that prevented him from finding employment. The ARB also found that EPA's failure to respond to the White Paper was not actionable blacklisting.

[Nuclear and Environmental Whistleblower Digest XIII B 18]
ADVERSE ACTION; FAILURE OF RESPONDENT TO STAND UP FOR THE COMPLAINANT'S REPUTATION

In ***Lewis v. U.S. Environmental Protection Agency***, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007), the Complainant was a microbiologist at the EPA's Office of Research and Development, but who was working at the time of the filing of the complaints under the Intergovernmental Personnel Act at the marine sciences department of the University of Georgia. The Complainant had been vocal about a lack of adequate research into the harmful effects of pathogens released during sludge fertilization, and was serving as an expert witness in a wrongful death case grounded in allegation that the death was related to sludge fertilization. In his environmental whistleblower complaint the Complainant alleged that the EPA engaged in adverse employment action when it failed to respond and defend him when the sludge fertilization company against whom the wrongful death action had been filed, the University of Georgia, and an advocacy group supporting the safety of sewage sludge sent letters to the EPA questioning the scope of the Complainant's IPA at the University. The Complainant argued on appeal that EPA's failure to respond harmed his scientific reputation and undermined his hope of obtaining a professorship at the University. The ARB, however, found no evidence that EPA's actions adversely affected the Complainant's work or standing at the University, noting also that there was no evidence that the University had offered him a position or even that the Complainant had ever applied for employment there.

[Nuclear and Environmental Whistleblower Digest XIII B 18]
ADVERSE ACTION; COMPLAINANT'S OPINION THAT THE RESPONDENT'S ACTIONS HARMED HIS PROFESSIONAL REPUTATION IS INSUFFICIENT, STANDING ALONE, TO DEMONSTRATE MATERIALLY ADVERSE EMPLOYMENT ACTION

In ***Lewis v. U.S. Environmental Protection Agency***, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007), the Complainant alleged that the Respondent's failure to credit his research in a *Federal Register* notice responding to a Congressionally commissioned report of the National Academy of Sciences on the scientific basis for EPA Rule 503, and EPA's failure to fund two scientific projects he had proposed, were adverse employment action because such actions harmed his professional reputation. The ARB agreed with the ALJ that there was scant, if any, evidence to demonstrate that EPA's actions were based on the Complainant's criticism of Rule 503. Moreover, the Complainant offered only his opinion that such actions harmed his reputation among his peers, which was insufficient to demonstrate that EPA's actions were actually, or potentially, materially adverse.

[Nuclear and Environmental Digest XIII C]
HOSTILE WORK ENVIRONMENT; EMPLOYER MAY AVOID LIABIILITY WHERE IT TAKES ACTION REASONABLY CALCULATED TO END THE HARASSMENT

In ***Overall v. Tennessee Valley Authority***, ARB No. 04-073, ALJ No. 1999-ERA-25 (ARB July 16, 2007), the ARB found that the record supported the ALJ's finding that a hostile work environment ("HWE") existed at the Respondent's facility, but that the Respondent was not liable for that situation. The Complainant had been reinstated after winning an earlier ERA whistleblower complaint. The Complainant was subjected to intentional harassment, such as anonymous telephone calls and messages, anonymous notes (such as "Silkwood," "BOO," and "STOP IT NOW"), a sarcastic comment from a supervisor, and a fake bomb placed in the back of his truck. The ARB found that this harassment altered the terms of employment and created an abusive work environment, and that it would have affected a reasonable whistleblower in the Complainant's circumstances and that it did detrimentally affect him. Although the Complainant did not directly prove that TVA employees harassed him, most of the incidents having involved anonymous perpetrators, the ARB inferred from the circumstances that TVA employees were responsible. The ARB then turned to whether the Respondent had adequately responded to the HWE, writing:

> …TVA will be liable for its employees' harassing conduct if it knew, or in the exercise of reasonable care should have known, of the harassment and failed to take prompt remedial action. To avoid liability, TVA must take both preventive and remedial measures to address workplace harassment. Once TVA knew about the harassment, the question becomes whether it addressed the problem adequately and effectively.

USDOL/OALJ Reporter at 19 (footnotes omitted). The ARB agreed with the ALJ that the Respondent had taken extensive steps to protect the Complainant from harassment before he returned to the facility and also acted promptly and appropriately to deal with both off-site and on-site harassment reported by the Complainant. The ARB wrote:

> [U]nder our precedent, TVA is not liable for a HWE claim if it addresses the harassment adequately and effectively. Addressing harassment adequately and effectively means taking action reasonably calculated to end the harassment. The employer is not required to achieve a result, only to take action. Here, though the harassment did not completely end, TVA was never indifferent to Overall's complaints. Rather, it took action reasonably calculated to end the harassment. Therefore, we find that TVA adequately and effectively addressed the harassment. As a result, it is not liable for the HWE.

USDOL/OALJ Reporter at 20-21 (footnotes omitted). The ARB rejected the Complainant's contention that under *Pennsylvania State Police v. Suders*, 542 U.S.

129 (2004), TVA would be strictly liable for the HWE because in *Suders*, unlike the instant case where the Complainant did not resign, the plaintiff had established that he had been constructively discharged, and because in *Suders*, unlike the instant case, the plaintiff's supervisors had been responsible for the HWE. The ARB also rejected the Complainant's contention that the Respondent's response to the HWE had been motivated solely by public relations concerns, and was incompetent and deliberately inept. The ARB found no evidence of record to support these sweeping contentions. Finally, the ARB rejected the Complainant's reliance on *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 1997-CA—9, slip op. at 23 (ARB Feb. 29, 2000), where the Board wrote, "In light of Berkman's notice to superiors about instances of harassment, and the superiors' failure to remedy the harassment, we find that the [employer] has *respondeat superior* liability for those harassing actions." The ARB distinguished *Berkman* because in that case supervisors took little, if any, action when the Complainant complained to them about the way he was being treated.

[Nuclear and Environmental Whistleblower Digest XIII C]
ADVERSE ACTION; DISTINCTION BETWEEN A CONTINUING VIOLATION AND A HOSTILE WORK ENVIRONMENT THEORY

In ***Lewis v. U.S. Environmental Protection Agency***, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007), the Complainant on appeal argued that the ALJ had ignored his "hostile work environment" argument. The ARB carefully reviewed the record and found no allegation, statement or testimony asserting a hostile work environment claim. Rather, the ARB found that the Complainant had made a "continuing pattern" of discrimination argument. The ARB, therefore declined to consider the hostile work environment claim on appeal. In so ruling, the ARB described the difference between a hostile work environment and continuing violation case:

> But the "continuing violation doctrine" is not the same as the hostile work environment theory of liability. Until the U.S. Supreme Court held otherwise in [*Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114-15 (2002)], the "continuing violation doctrine" allowed a plaintiff to recover for discrete adverse actions that occurred outside of the limitations period if he could prove that these claims were "sufficiently related" to an adverse act that did occur within the limitations period. Hostile work environment claims, however, differ from claims involving discrete acts. Hostile work claims involve repeated harassment occurring over a period of time rather than adverse action that occurs on a particular day.

Lewis, *supra*, USDOL/OALJ Reporter at 23 (footnote omitted).

[Nuclear and Environmental Whistleblower Digest XIII C]
TIMELINESS OF COMPLAINT; CONTINUING VIOLATION DOCTRINE NO LONGER VIABLE

In ***Lewis v. U.S. Environmental Protection Agency***, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB Mar. 30, 2007), the ALJ erred in applying the "continuing violation" doctrine to find that the Complainant had made a timely complaint alleging that the EPA had engaged in adverse employment action when it failed to follow its internal peer review process for granting permission to its scientists to publish research papers. Rather, the ARB found applicable the "discrete action" standard from *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 114-15 (2002). Thus, because the Complainant knew more than two months prior to filing of his environmental whistleblower complaint that a scientist well-known to advocate a position different from that of the Complainant in regard to the subject of the paper (whether sludge fertilization presents public health risks) had inappropriately participated in the peer review, and the applicable limitations period was only 30 days, the complaint was untimely.

[Nuclear and Environmental Digest XIII D]
ADVERSE ACTION; BEING SENT HOME EARLY FOUND NOT TO BE MATERIALLY ADVERSE WHERE COMPLAINANT GIVEN CLEAR NOTICE FROM A MANAGER THAT HE WAS NOT FIRED AND WOULD NOT LOSE ANY INCOME

In ***McNeill v. USDOL***, No. 05-4190 (6th Cir. June 27, 2007) (unpublished) (case below ARB No. 02-002, ALJ No. 2001-ERA-3), the court found that substantial evidence supported the ARB's holding that the Complainant had not been terminated, and that even if he had been terminated, this action had not been materially adverse. The Complainant had been sent home early after disputing his work instructions (which he had the right to do if the instructions were incomplete). The Complainant asserted that he had been terminated and his unescorted access denied. Although the Complainant presented some countervailing evidence, substantial evidence supported the ARB's finding that the Complainant's first-line supervisor did not have the authority to fire him. The court also rejected the Complainant's contention that being sent home early constituted a materially adverse employment action. The court found that, except for a period of at most a few hours, during which the Complainant may have believed that he was terminated, the Complainant had been clearly notified by telephone conversation with his manager that he was not terminated and would not lose any income. Citing to *Burlington Northern & Santa Fe Railway Co. v. White*, - - U.S. - -, 126 S. Ct. 2405 (2006), the court concluded that a reasonable worker would not have been dissuaded from blowing the whistle under the circumstances.

The court also found that substantial evidence supported the ARB's determination that the Complainant's unescorted access had been placed on administrative hold (a temporary and routine measure when employees are involved in an "incident") rather than denied. Thus, the court rejected the Complainant's assertion that he

would have to report his termination and loss of access to potential future employers.

The Complainant argued that the Respondent's actions towards him created a chilling effect, and presented the testimony of one worker who, because of what he had heard about the Plaintiff's situation, believed that he had to work instruction packages as written or face being fired. The court rejected this argument, observing that the relevant issue was whether the Complainant suffered a materially adverse employment action, and not whether the other worker may have been negatively affected by hearing about the Complainant's alleged termination. The court also held that the Respondent had acted swiftly and thoroughly to assuage any potential notion that employees could not safely engage in activity protected by the ERA.

XVI. Damages and remedies

[Nuclear and Environmental Digest XVI B 4]
FRONT PAY; USE OF "ALASKA RULE" TO OBVIATE NEED FOR DISCOUNTING TO PRESENT VALUE

In ***Tipton v. Indiana Michigan Power Co.***, ARB No. 04-147, ALJ No. 2002-ERA-30 (ARB June 27, 2007), the ARB granted the Respondent's motion to reconsider its front pay award, arguing that the ARB should have discounted it to present value. On reconsideration, the ARB declined to discount to present value, but did modify the award based on the analysis found in *Jackson v. City of Cookeville*, 31 F.3d 1354, 1361 (6th Cir. 1994), in which the court affirmed a district court's use of a variation of the "Alaska Rule" – *i.e.*, a "total offset" approach that obviates the need for discounting by refraining from calculating future salary increases into the front pay award.

[Nuclear and Environmental Digest XVI D 4 d]
TAX IMPLICATIONS OF WHISTLEBLOWER AWARD

In *Murphy v. Internal Revenue Service*, No. 05-5139 (D.C.Cir. Aug. 22, 2006), the Plaintiff had been awarded damages in a Department of Labor whistleblower proceeding, which included payments for "emotional distress or mental anguish" and "injury to professional reputation." *See Leveille v. New York Air National Guard*, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Oct. 25, 1999). The Plaintiff initially paid taxes on the award, but later filed an amendment seeking a refund. The IRS denied the request for refund, and the Plaintiff filed suit in federal court arguing that the amount should have been excluded from gross income under 26 U.S.C. § 104(a), which provides an exclusion for damages received on account of personal physical injuries or physical sickness, or in the alternative that the I.R.C. provision was unconstitutional to the extent that failed to exclude damages awarded for emotional distress and injury to professional reputation. The District Court rejected both arguments. The Court of Appeals for the District of Columbia also rejected the first

argument, but accepted the constitutional argument, finding that damages for matters such as emotional distress and injury to reputation are not income within the meaning of the 16th Amendment to the Constitution. The Department of Justice thereafter petitioned for an en banc hearing. The appeals panel, however, issued an Order on December 22, 2006 vacating the August 22, 2006 decision, and scheduling oral argument. ***Murphy v. Internal Revenue Service***, No. 05-5139 (D.C. Cir. Dec. 22, 2006).

In its decision on rehearing, the Court of Appeals held that the compensatory damages award, "even if it is not income within the meaning of the Sixteenth Amendment, is within the reach of the congressional power to tax under Article I, Section 8 of the Constitution." ***Murphy v. Internal Revenue Service***, No. 03-CV-02414 (D.C.Cir. July 3, 2007), slip op. at 5-6. Moreover, upon close review of the ALJ and ARB decisions, the court found that the Plaintiff compensatory damages award was not "awarded by reason of, or because of, ... [physical] personal injuries," and therefore § 104(a)(2) of the IRC did not permit her to exclude the award from gross income. *Id.* at 11. The court held that "gross income in § 61(a) must ... include an award for nonphysical damages such as Murphy received, regardless of whether the award is an accession to wealth." *Id.* at 19.

[Nuclear and Environmental Whistleblower Digest XVI F]
PUNITIVE DAMAGES; WHETHER RESPONDENT ACTED WITH RECKLESS DISREGARD FOR THE COMPLAINANT'S RIGHTS

In ***Collins v. Village of Lynchburg, Ohio***, 2006-SDW-3 (ALJ May 8, 2007), the ALJ reviewed legal precedent indicating that, when determining whether to impose exemplary damages, a respondent's state of mind should be analyzed to determine whether the respondent acted in reckless disregard for the complainant's rights, and then whether the respondent engaged in a conscious action in the deliberate disregard of those rights. Based on that criteria, the ALJ recommended an award of $20,000 in punitive damages where the village's mayor immediately fired the Complainant, without investigation or even asking the Complainant's side of the story, after the Complainant called the state EPA to report a concern about testing procedures for the village's water supply. Rather, the mayor's immediate reaction was to seek to have the Complainant criminally investigated for making a false report rather than to conduct his own internal investigation. The ALJ found that the mayor acted with reckless disregard for the law and complete indifference to the Complainant's rights.

XVII. Settlements

[Nuclear & Environmental Digest XVII A]
SETTLEMENT UNDER BOTH STAA AND ENVIRONMENTAL STATUTES WHERE NO PARTY APPEALS; ARB REVIEW OF SETTLEMENT IS LIMITED TO THE STAA CLAIM

In ***Andrews v. Max Trans, LLC***, ARB No. 07-065, ALJ No. 2006-STA-45 (ARB May 30, 2007), the parties settled a whistleblower case involving both the Surface Transportation Assistance Act, and the TSCA, SDWA, SWDA, WPCA, and CERCLA. The ARB reviewed and approved the settlement in regard to the STAA because it issues the final order in such cases. The ARB, however, did not review the settlement under the environmental laws because no party had filed an appeal.

XX. Relationship between 29 C.F.R. Part 24 and other laws

[Nuclear and Environmental Digest XX E]
SOVEREIGN IMMUNITY; TENNESSEE VALLEY AUTHORITY NOT IMMUNE FROM AN ERA WHISTLEBLOWER SUIT

In ***Overall v. Tennessee Valley Authority***, ARB No. 04-073, ALJ No. 1999-ERA-25 (ARB July 16, 2007), the ALJ had held that the Tennessee Valley Authority was not immune from the Complainant's ERA whistleblower suit because Congress had waived TVA's immunity when it included a "sue and be sued" clause in TVA's enabling legislation. *See* 16 U.S.C.A. § 831c(b). On appeal the ARB agreed. The ARB held that Congress did not expressly restrict TVA's ability to sue and be sued, and because TVA had not shown any implied exception to the waiver of sovereign immunity, it was not immune.

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TRIBAL SOVEREIGN IMMUNITY

In ***Kanj v. Viejas Band of Kumeyaay Indians***, ARB No. 06-074, ALJ No. 2006-WPC-1 (ARB Apr. 27, 2007), the ARB accepted interlocutory review "on the question whether Congress abrogated the Band's sovereign immunity from suit by a private citizen pursuant to [the Federal Water Pollution Control Act a/k/a the Clean Water Act] 33 U.S.C.A. § 1367 (West 2001)." The ARB affirmed the ALJ's findings that Congress abrogated tribal sovereign immunity under the FWPCA, and that tribal immunity from suit based on self-government in purely intramural matters did not arise.